American Bar Association
www.supremecourtpreview.org

No. 07-1216

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF ON BEHALF OF NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SHEILA L. BIRNBAUM
Counsel of Record
DOUGLAS W. DUNHAM
ELLEN P. QUACKENBOS
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

I. REMITTITUR IS NOT A SUFFICIENT REMEDY FOR THE CONSTITUTIONAL ERROR IN THIS CASE, AND A NEW TRIAL IS WARRANTED 4

II. IN THIS CASE THE APPROPRIATE REMEDY IS A NEW TRIAL ON PUNITIVE DAMAGES AND THE UNDERLYING CLAIMS 7

CONCLUSION 11

TABLE OF AUTHORITIES

Cases ..... Page(s)

Atlas Food Systems & Services, Inc. v. Crane National Vendors, Inc., 99 F.3d 587 (4th Cir. 1996) 4

Chicago, R.I. & P. Railway v. Batsel, 140 S.W. 726 (Ark. 1911) 6

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 3

EEOC v. Stocks, Inc., 228 Fed. Appx. 429 (5th Cir. 2007) 8

Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931) 8

Goddard v. Farmers Insurance Co., 179 P.3d 645 (Or. 2008) 5

Hansen v. Boyd, 161 U.S. 397 (1896) 5

Hardin v. Caterpillar, Inc., 227 F.3d 268 (5th Cir. 2000) 8

Hardman v. AutoZone, Inc., 214 Fed. Appx. 758 (10th Cir. 2007) 10

Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41 (1895) 6, 7

McDonough v. City of Quincy, 452 F.3d 8 (1st Cir. 2006) 7

Memphis Community School District v. Stachura, 477 U.S. 299 (1986) 3, 5

Merrick v. Paul Revere Life Insurance Co., 500 F.3d 1007 (9th Cir. 2007) 4, 5

Morrison Knudsen Corp. v. Fireman's Fund Insurance Co., 175 F.3d 1221 (10th Cir. 1999) 8, 9

Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) ..... *passim*

Simone v. Golden Nugget Hotel & Casino, 844 F.2d 1031 (3d Cir. 1988) 8, 9

Waddill v. Anchor Hocking, Inc., 78 P.3d 570 (Or. Ct. App. 2003) 5

Werbungs und Commerz Union Austalt v. Collectors' Guild, Ltd., 930 F.2d 1021 (2d Cir. 1991) 4

Williams v. Philip Morris Inc., 127 P.3d 1165 (Or. 2006) 9

Rules & Statutes ..... Page(s)

28 U.S.C. § 2106 10

Supreme Court Rule 37.6 1

Other Authorities ..... Page(s)

A. Scott, *Fundamentals of Procedure in Actions at Law* (1922) 6

J.G. Sutherland, *Sutherland on Damages* (4th ed. 1916) 5

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Association of Mutual Insurance Companies (NAMIC) is a national trade association representing companies writing property and casualty insurance in every state and jurisdiction of the United States. NAMIC has more than 1,400 member companies that underwrite 43 percent ($196 billion) of the property/casualty insurance premiums in the United States. NAMIC members account for 44 percent of the homeowners market, 38 percent of the automobile market, 39 percent of the workers' compensation market, and 31 percent of the commercial property and liability market. NAMIC benefits member companies through advocacy, public policy and member services. NAMIC regularly appears in judicial proceedings as an *amicus* to inform courts about the implications of legal developments for its members.

In this case, this Court has granted certiorari on the question of whether the Oregon Supreme Court acted within its power and discretion when it chose to disregard this Court's mandate to apply the standard this Court had set forth in *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007), and instead held that Philip Morris had procedurally defaulted under state law and had forfeited its claim of constitutional error in the punitive damages jury instructions that were the subject of this Court's opinion.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* NAMIC states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have given blanket consent to the filing of all *amicus* briefs in this case, in letters of consent filed with the Clerk of this Court.

Amicus and its member insurance companies have a substantial interest in issues relating to punitive damages. This case, in addition to the specific question presented, necessarily also raises the question as to the appropriate procedures on remand. This is a significant question for NAMIC's members and one that will surely continue to arise in punitive damages cases, thus warranting guidance from this Court. NAMIC respectfully submits that, in a case where the jury's verdict has been affected by a constitutional error in jury instructions in a manner and to an extent which is by its nature unknowable, the defendant is entitled as a matter of due process to a retrial. Moreover, depending on the nature of the case, the new trial should in some instances involve a full re-examination by the new jury of both underlying liability issues and punitive damages issues.

SUMMARY OF ARGUMENT

The Court should reverse the Oregon Supreme Court's finding of procedural default and should direct the Oregon Supreme Court to grant a new trial on both the issue of punitive damages and the underlying claims upon which the punitive award was based.

A new trial is a necessary remedy where the constitutional error at issue is an instructional error that goes to the basis and standard for the imposition of punitive damages. Such an error occurred in this case in the trial court's failure to give the jury instructions that would protect the defendant from the unconstitutional imposition of punitive damages punishing the defendant's conduct toward third parties who are strangers to the case. *See Williams*, 127 S. Ct. at 1065.

This Court has made clear that "[w]hen damages instructions are faulty and the verdict does not reveal the means by which the jury calculated

damages, '[the] error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict,'" because the "effect of the erroneous instruction is . . . unknowable." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 312 (1986) (second alteration original) (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 n.12 (1981)). This principle has repeatedly been applied when punitive damages jury instructions have been ruled erroneous. In such cases, remittitur to the constitutionally allowable maximum may result in an award that is higher than the jury would have awarded if properly instructed.

Amicus also submits that in certain circumstances, including the circumstances presented by this case, a full retrial of the underlying claims upon which the punitive damages award were based may be necessary. This is especially so where it cannot be determined what specific conduct the jury sought to punish and/or what specific conduct formed the basis for liability on the underlying claims. Here, the punitive award was based upon plaintiff's claim that her husband, Jesse Williams, relied upon misrepresentations by the defendant-appellant as to the safety and properties of cigarettes. Mr. Williams smoked for many years, and evidence was introduced at trial of many various representations in mass advertising and the media made over a period of decades by the defendant. It is not known and cannot be known which of these representations the original jury found to be actionable misrepresentations relied upon by Mr. Williams.

Accordingly, a retrial of only the punitive damages issue would leave the new jury to speculate as to what conduct by the defendant was actually adjudged tortious and on what conduct it should base a new punitive award. Such a procedure would fall foul of the now well established principle that punitive damages must be based upon a defendant's *wrongful* conduct toward the plaintiff. Without a new trial as to the underlying claims as well as of

the punitive damage claim, there is a substantial risk that a second jury may impermissibly punish conduct that the first jury did not find to be tortious.

I. REMITTITUR IS NOT A SUFFICIENT REMEDY FOR THE CONSTITUTIONAL ERROR IN THIS CASE, AND A NEW TRIAL IS WARRANTED

Remittitur is the established method by which a trial judge can correct a punitive damages award for excessiveness. *See, e.g., Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 593 (4th Cir. 1996). In most circumstances, however, remittitur will not cure a defective punitive damages jury instruction, and the appropriate remedy is a new trial.

"Remittitur is appropriate to reduce verdicts only in cases 'in which a properly instructed jury hearing properly admitted evidence nevertheless makes an excessive award.'" *Werbungs und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991) (citation omitted). It is not an appropriate remedy for excessive verdicts in cases where "'error has infected the jury's entire consideration" of the evidence on damages. *Id.* at 1027-28 (citation omitted).

Indeed, the United States Court of Appeals for the Ninth Circuit, citing this Court's earlier opinion in this case, held that a new trial on punitive damages was required where (as here) "the district court erred in failing to instruct the jury that it could not punish the defendants for conduct that harmed only nonparties." *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1017-18 (9th Cir. 2007) (citing *Williams*, 127 S. Ct. at 1065). The Ninth Circuit opined that, although "*Williams* suggests in passing that a panel may remedy this error either by granting a new trial or reducing the amount of

punitive damages," *Merrick*, 500 F.3d at 1017-18, remittitur "seems less appropriate where the constitutional error stems from misguidance regarding the way the jury may use evidence in setting an amount." *Id.* at 1018.

As this Court explained in a similar context, "[w]hen damages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, '[the[error in the charge is difficult, if not impossible, to correct without retrial . . . .'" *Memphis Cmty. Sch. Dist.*, 477 U.S. at 312. Thus, when "[t]he effect of the erroneous instruction is . . . unknowable," the proper remedy is a new trial. *Id.* at 312-13. In the present case, there is no way of knowing what portion of the punitive award was intended to punish conduct towards third parties and no way of knowing the amount of punitive damages the jury would have imposed if properly instructed. It cannot be simply assumed that if properly instructed the jury would have decided to impose the maximum constitutionally allowable punishment – which is the number that remittitur would provide.[2]

The principle set forth by this Court in *Memphis Community School District* was already firmly established as long ago as this Court's opinion in *Hansen v. Boyd*, 161 U.S. 397 (1896). *See id.* at 411 ("[T]o avoid the granting of a new trial on account of error affecting a part thereof, [a Court may enter] a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same."). *See also* 2 J.G. Sutherland, *Sutherland on Damages* § 459, at 1504 (4th ed. 1916) ("where the erroneous part of the damages found by the jury cannot be ascertained, and it is impossible to tell what the jury acted upon, or how they made up their verdict under

---

[2] *See, e.g., Goddard v. Farmers Ins. Co.*, 179 P.3d 645, 670-71 (Or. 2008) (en banc); *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 572 (Or. Ct. App. 2003).

the charge of the court, so as to correct the error and arrive at the amount they should have given, justice cannot be done by a remittitur").

Likewise, when courts have used remittitur in circumstances where the precise effect of an erroneous charge or other error on damages could not be ascertained, the courts have based remittitur not on the maximum damages the jury could have reasonably found, but upon the *lowest* amount which a jury could reasonably have awarded, recognizing that only so could it be ensured that the error was rendered harmless. As one treatise stated nearly a century ago:

> Where the court has made an erroneous ruling on the admission or exclusion of evidence as to the amount of damages, or has given an erroneous charge as to the measure of damages, it may be that it is impossible to say how much the jury would have awarded if no such error had been made. In such a case it would seem that a new trial upon the question of damages is necessary, unless the plaintiff is willing to accept the lowest amount which a jury could reasonably have awarded, if it had been uninfluenced by evidence which was improperly admitted, or if it had considered evidence which was improperly excluded, or if it had been properly instructed on the law.

A. Scott, *Fundamentals of Procedure in Actions at Law* 125 (1922) (footnote omitted); *see also, e.g.*, *Chicago, R.I. & P. Ry. v. Batsel*, 140 S.W. 726, 729 (Ark. 1911) (adhering to the rule of remitting damages to a figure "'so low that there can be no reasonable ground to believe that a jury of average judgment, after considering the evidence, would, when properly instructed as to the law, allow plaintiff a less sum than that named'"); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 52-53 (1895) (setting remittitur at a figure

so low that "no injustice was done to the defendant" by the error at trial). In the context of punitive damages, remittitur to the *lowest* amount a reasonable jury could have awarded is not a practicable remedy as that amount is likely zero. However, these cases illustrate the inherent inadequacy of the remedy of remitting a punitive award to the maximum constitutional amount where instructional error is at issue – namely, there can be no assurance that the effect of the error has been corrected.

In short, the basic principle adhered to by this Court and others is that an instructional error affecting damages should be rendered harmless to the defendant, and where it cannot be made harmless by remittitur, a new trial is in order. Where, as here, the instructional error was constitutional and where, to the extent that error affected the amount of punitive damages awarded, it resulted in a taking of property from the defendant without due process, *see Williams*, 127 S. Ct. at 1060, the issue of the remedy for that error is also of constitutional dimensions.

II. IN THIS CASE THE APPROPRIATE REMEDY IS A NEW TRIAL ON PUNITIVE DAMAGES AND THE UNDERLYING CLAIMS

The determination whether a retrial limited to punitive damages would be fair must be decided case by case. *See McDonough v. City of Quincy*, 452 F.3d 8, (1st Cir. 2006); *Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 272-73 (5th Cir. 2000). Considerations which may require a retrial of the underlying claims as well as of the punitive damages claim include whether the award of compensatory damages may include some element of punishment for the defendant's reprehensibility, which could be duplicated in a retrial limited to punitive damages, *see McDonough*, 452 F.3d at 24-25, and whether the

verdict on punitive damages "is 'intertwined with [the jury's] view of the facts determining liability.'" *EEOC v. Stocks, Inc.*, 228 Fed. Appx. 429, 432-33 (5th Cir. 2007) (citation omitted); *accord Hardin*, 227 F.3d at 272-73. As this Court stated in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931), the propriety of granting a new trial on fewer than all of the issues in a case hinges on whether the issues to be retried are sufficiently "distinct and separable from the others that a trial of [those issues] alone may be had without injustice."

Where the issues of liability and punitive damages are "inextricably intertwined," "[i]f a district court were to retry only one of two such intertwined issues to a second jury, while maintaining the vitality of the first jury's findings on the other issue, it would cause confusion and uncertainty and, thus, an unfair trial." *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1256 (10th Cir. 1999).

In *Simone v. Golden Nugget Hotel & Casino*, 844 F.2d 1031, 1040-41 (3d Cir. 1988), the Third Circuit "interpreted the *Gasoline Products* standard to prevent determination of damages separate from liability when there is a complex or tangled fact situation." In affirming the trial court's decision to hold a new trial on both liability and damages on the plaintiff's false imprisonment claim in that case, the Third Circuit held that the "issues of liability and damages [were] interwoven warp and woof." *Id.* at 1041. The court stated:

> [I]t is not clear from the [first] jury's answers to interrogatories whether it attributed any of [the plaintiff's] physical injuries to the claim of false imprisonment. To calculate compensatory damages in a new trial, that jury would have to determine which, if any, of [the plaintiff's] injuries were incurred because of the false imprisonment. To do that, it would first have to find at what points the unlawful detention began and

> ended. Moreover, on the question of punitive damages, the jury would have to assess the conduct of the Golden Nugget to determine whether it acted with malice or in willful disregard of [the plaintiff's] rights.

Id.

In the case before the Court, although a second jury could perhaps be instructed by the trial court with regard to certain of the underlying findings by the first jury, instruction as to other, crucial issues could only be based upon speculation as to the basis for the first jury's verdict. Accordingly, maintaining the vitality of the first jury's finding as to liability and damages on plaintiff's misrepresentation claim, while asking a second jury to determine whether punitive damages should be imposed based upon that claim, would present the substantial risk of confusion, uncertainty and an unfair trial recognized by the court in *Morrison Knudsen*, 175 F.3d at 1256.

In this case, the issue of punitive damages is inextricably interwoven with all the circumstances giving rise to the plaintiff's harm. In particular, the evidence of the defendant's alleged misrepresentations in this case spanned several decades. [3] Furthermore, during most of that time period, federal law required public disclosures on every package of cigarettes, and the detail and content of these disclosures changed from year to year. Accordingly, in reaching a verdict on plaintiff's fraud

---

[3] *See, e.g., Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1168-69 (Or. 2006) (describing the claim against defendant as based "on a 40-year publicity campaign by Philip Morris and the tobacco industry"), *vacated*, 127 S. Ct. 1057 (2007). In addition, the jury's finding that Mr. Williams' own negligence was a cause of his damages, *see* Joint Appendix 43a, may raise further questions about precisely what conduct at issue in the misrepresentation claim was deemed by the jury to have caused damage to Mr. Williams.

claim, the first jury was tasked with sifting through evidence relating to a multitude of different alleged misrepresentations, evaluating the circumstances surrounding each, and deciding as to Mr. Williams' reasonable reliance, or lack thereof. It is impossible to ascertain the jury's findings in this regard. Thus, not only is it impossible to know from the jury's verdict what portion, if any, of the punitive award the jury intended to punish conduct towards third parties, but it also cannot be known from the jury's verdict which part or parts of the conduct at issue were found by the jury to be tortious as to the plaintiff here and formed the basis for the jury's finding of liability on plaintiff's underlying claim.

In these circumstances, it is not possible for a second jury to identify – and limit any award of punitive damages to – the conduct for which the original jury imposed tort liability. *Cf. Hardman v. AutoZone, Inc.*, 214 Fed. Appx. 758, 765-66 (10th Cir. 2007) (affirming district court's grant of a full retrial, rather than a trial on punitive damages only, because "a second jury tasked only with having to determine a new punitive damage award would unfairly be required to 'speculate as to what AutoZone conduct formed the basis of the first jury's verdict of liability and award of nominal damages'"). Under this Court's earlier decision in this case, it is only the conduct found by the jury to have harmed plaintiff in this case that can, as a constitutional matter, be punished by the imposition of punitive damages. *See Williams*, 127 S. Ct. at 1065.

Accordingly, a new trial on liability as well as punitive damages is necessary, and this Court should exercise its power to direct the grant of a new trial. *See* 28 U.S.C. § 2106 ("The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further

proceedings to be had as may be just under the circumstances.").

CONCLUSION

For all the foregoing reasons, *amicus curiae* respectfully submits that the Court should reverse and remand, with instructions that a new trial be held.

Respectfully Submitted,

Sheila L. Birnbaum*
Douglas W. Dunham
Ellen P. Quackenbos

**Counsel of Record*
Skadden, Arps, Slate,
Meagher & Flom LLP
Four Times Square
New York, NY 10036
(212) 735-3000